Supreme Court, U. S.
FILED
NOV 10 1977
MICHAEL RODAK, JR., CLERK

No. 76-1359

In the Supreme Court of the United States

OCTOBER TERM, 1977

BANKERS TRUST COMPANY, PETITIONER

v.

SAMUEL MALLIS AND FRANKLYN KUPFERMAN

MOTION OF THE UNITED STATES FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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The Solicitor General, on behalf of the Securities and Exchange Commission, moves this Court for leave to file a brief as *amicus curiae* after the time limit specified by Rule 42(2). Cf. Rule 42(4).

This Court granted certiorari on May 23, 1977. Petitioner's brief was filed on August 18, 1977. Respondents obtained an extension for filing their brief to October 10, 1977, but filed their brief on September 28, 1977.

The Commission's brief supporting the respondents' position addresses a number of points raised by petitioner Bankers Trust and *amicus curiae* Clearing House but not answered by the respondents. The Commission's brief discusses the nature of a pledge transaction and its similarities to an outright sale,

analyzes the case law relating to pledges in both the civil and the criminal context and distinguishes this case from *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723. Furthermore, the Commission's brief, unlike that of the respondents, addresses not only the issues raised by this particular transaction but the consequences that this Court's decision may have on securities transactions generally and upon private litigation, civil enforcement cases brought by the Commission, and criminal proceedings. For these reasons, the brief would be helpful to the Court in analyzing and deciding the case.

The record in this litigation is confusing and, in some places, conflicting. This is so because the district court incorporated into its record the papers filed by one of the respondents in an earlier state court action. The original district court complaint did not contain an allegation of fraud, the present theory of this action. While the state court papers did allege fraud, the fraud was there alleged to have been committed through nondisclosure. Subsequently, respondents alleged in the district court that the fraud was committed through misrepresentation. Due to this state of the record, it was difficult for the Securities and Exchange Commission to determine the precise nature of the issues involved in this litigation and, hence, to decide whether it should participate as *amicus curiae* before this Court.

Because of the difficulty described above, the members of the Commission considered this case on two

occasions (August 25 and September 19) before requesting the Solicitor General to file a brief. On September 30, the Commission sent its draft to the Office of the Solicitor General. There was extensive discussion between lawyers in this Office and the Commission staff, and the draft brief was further revised. This process took substantially longer than anticipated. A page proof of the brief was served by mail upon petitioner's counsel on November 3, 1977, and a revised proof was served on them on November 7, 1977.

WADE H. MCCREE, JR.,
Solicitor General.

NOVEMBER 1977.

U.S. GOVERNMENT PRINTING OFFICE: 1977